

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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JOVANNA EDGE, an )  
individual; LEAH HUMPHREY, )  
an individual; LIBERTY )  
ZISKA, an individual; AMELIA )  
POWELL, an individual; )  
NATALIE BJERKE, an )  
individual; BRITTANY GIAZZI, )  
an individual; JUANITA )  
CASTANEDA GUERRERO, an )  
individual; AND MATTESON )  
HERNANDEZ, an individual, )  
Plaintiffs, ) No. 2:17-cv-01361-MJP  
vs. ) Seattle, WA  
CITY OF EVERETT, a )  
Washington Municipal )  
Corporation, )  
Defendant. ) Preliminary Injunction Hearing  
November 21, 2017

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JUDGE MARSHA J. PECHMAN  
UNITED STATES DISTRICT COURT

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1 THE CLERK: This is in the matter of Jovanna Edge vs.  
2 the City of Everett, Cause Number C17-1361-MJP.

3 Counsel, please rise and make your appearance for the  
4 record.

5 MR. NEWMAN: Good morning, Your Honor. My name is  
6 Derek Newman. I'm joined by Jessica Newman and Jason Sykes.  
7 We represent the plaintiffs, Jovanna Edge, Amelia Powell, Leah  
8 Humphrey, Matteson Hernandez, Natalie Bjerke, and Liberty  
9 Ziska, all of whom are bikini baristas in the city of Everett.

10 MS. JOHNSON: Good morning, Your Honor. Sarah  
11 Johnson, from Pacifica Law Group, here on behalf of the City of  
12 Everett. And with me here today are Jamie Lisagor and Sarah  
13 Washburn, also from Pacifica, and Ramsey Ramerman, from the  
14 City of Everett City Attorney's Office.

15 THE COURT: Very good. Well, welcome.

16 I have had an opportunity to read the plaintiffs' motion  
17 for the preliminary injunction, the City of Everett's  
18 opposition to the motion for the preliminary injunction. I  
19 have read the attendant affidavits that were supplied in  
20 support of the motions. And I have read the reply and the  
21 surreply.

22 Is there anything else I should have reviewed in order to  
23 hear you this morning?

24 MS. JOHNSON: Not that I'm aware of.

25 THE COURT: Okay. All right. Then it's the

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1 plaintiffs' motion for the preliminary injunction. They get to  
2 argue first and last.

3 MR. NEWMAN: Your Honor, this case is about how far  
4 the City of Everett can go to control what women wear at work  
5 and in public. To obtain a preliminary injunction, the  
6 baristas first have to establish a likelihood of success on the  
7 merits. And I'll start with the first claim for violation of  
8 the First Amendment to the United States Constitution.

9 The First Amendment protects expression. And conduct  
10 sufficiently imbued with elements of communication qualifies as  
11 expression under the First Amendment. Baristas confidently  
12 serving coffee while wearing a bikini portrays messages of  
13 empowerment, acceptance, fearless body acceptance,  
14 individuality, openness, and acceptance. And each of the  
15 baristas has her own message. Liberty Ziska, for example, has  
16 tattoos that she can only display if she's wearing a bikini.  
17 She proudly displays them when she's working as a bikini  
18 barista, and she does so to open dialogue with customers about  
19 what those bikinis mean to her -- those tattoos. And the  
20 customers understand that message, because they ask her about  
21 the tattoos. Similarly, Leah Humphrey has scars. They each  
22 represent a different part of her life. They only show when  
23 she's wearing a bikini. And she displays them so that  
24 customers open a dialogue about those parts of her life. And  
25 customers understand that message, because they do ask her

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1 about them. And Natalie Bjerke custom designed outfits for the  
2 bikini barista stand. Those outfits constitute her art, and  
3 she proudly displays her art while working as a bikini barista.

4 So the baristas are engaged in expression. And I don't  
5 know that that is really in dispute. I think the only dispute  
6 as to expression is what the message is. The City submits that  
7 it's a message of sexualization. On the face of the dress code  
8 ordinance, it says that the conduct being regulated is that  
9 closely associated with adult entertainment. And the City is  
10 going to ask the Court to strictly construe *Spence vs. State of*  
11 *Washington*, which held that expression requires a  
12 particularized message that's readily understood by those who  
13 view it. But the Supreme Court, 20 years after *Spence*, over 20  
14 years ago, held that a particularized message is not required.  
15 And so even if the City is successful at convincing the Court  
16 the message is one of sexualization, it's irrelevant to the  
17 analysis, it's still expression, and still qualifies for  
18 protection under the First Amendment.

19 So having established expression, the Court then looks at  
20 the ordinances at issue and asks whether they're content based  
21 on content neutral. A content-based regulation is one that  
22 applies because of the message expressed. These ordinances  
23 apply because of the message expressed. They are content  
24 based. The ordinances, the dress code ordinance, for example,  
25 regulates what women wear, specifically requires that they

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1 cover the upper and lower parts of their body, including the  
2 back below the shoulder blades, and the stomach, and those are  
3 the very parts that form the foundation of their expression at  
4 a bikini barista stand.

5 In *State of Texas vs. Johnson*, the Supreme Court  
6 considered Texas' ban on flag burning. The State of Texas said  
7 that that ban on flag burning was necessary to prevent a breach  
8 of the peace. Because whenever a flag is burned, there's  
9 generally a breach of the peace. The Supreme Court, analyzing  
10 that ordinance, found that it was content based. Because to  
11 prohibit a breach of the peace, Texas already had a law in  
12 place that expressly prohibited a breach of the peace, and that  
13 this ordinance banning flag burning could only go to the  
14 message expressed.

15 The ordinances here are no different. The City of Everett  
16 says that the ordinances are necessary to protect against  
17 crimes, like prostitution, sexual exploitation of minors, and  
18 lewd conduct. But the City already has ordinances in place  
19 that expressly prohibit prostitution, lewd conduct, and the  
20 sexual exploitation of minors. These new ordinances do nothing  
21 to further that interest; rather, they go to the baristas'  
22 message. They are, therefore, content based. And when an  
23 ordinance is content based, strict scrutiny applies. Strict  
24 scrutiny places the burden on the City to show that the law is  
25 narrowly tailored to its stated interest, and that no least

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1 restrictive means exists to accomplish that same interest.

2 In *Texas vs. Johnson*, the Supreme Court looked at the  
3 ordinance governing flag burning and found that the less  
4 restrictive means of achieving the interest was the law that  
5 already existed that expressly banned a breach of the peace.  
6 And so the law banning flag burning, although it might address  
7 a breach of the peace, wasn't the less restrictive means  
8 possible, and the State of Texas could not survive strict  
9 scrutiny. Similarly here, because there are already laws that  
10 prohibit prostitution and sexual exploitation of minors and  
11 lewd conduct, this law can't survive strict scrutiny, because  
12 there's already a less restrictive means of achieving the  
13 stated interest, which is the existing laws.

14 And the City cannot survive strict scrutiny, and I don't  
15 know that the City even disputes that. Because in the  
16 opposition to the plaintiffs' motion for preliminary  
17 injunction, the City never argued that it could survive strict  
18 scrutiny; rather, the City argued that intermediate scrutiny  
19 should apply. Intermediate scrutiny applies when a regulation  
20 is content neutral. A regulation is content neutral when it is  
21 unrelated to the suppression of free expression. This  
22 ordinance, these ordinances, are not unrelated to the  
23 suppression of free expression. But assuming that they are,  
24 intermediate scrutiny places the burden on the City to show  
25 that there are legitimate secondary effects of crime, and that

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1 there is a causal connection between the secondary effects and  
2 the regulated conduct, here the wearing of a bikini at a  
3 barista stand.

4 In order to establish the secondary effects, the City  
5 submits a legislative record full of police reports. But  
6 90 percent of those police reports relate to two criminal  
7 actors, from between four and eight years ago. Both those  
8 criminals the City successfully prosecuted under existing laws,  
9 and neither of the criminals are in the bikini barista business  
10 today. It's unreasonable to assume that if these ordinances  
11 were in effect, that those criminals would have complied with  
12 the law. And also, the City can't establish that those crimes  
13 were committed because of a connection to wearing bikinis, as  
14 opposed to covering the back below the shoulder blades and the  
15 stomach. And so there isn't a causal connection between the  
16 alleged secondary effects and the regulated conduct.

17 The City also submits a declaration of Captain John  
18 DeRousse. He's a captain with the Everett Police Department.  
19 And he used a police database and typed in the word "barista"  
20 and concludes that there were 65 incidences of crime at the  
21 bikini barista stands in the last year and a half. But when  
22 looking further into that data, it is apparent that there are  
23 actually only 12 incidences. And that same data reveals that  
24 most of those incidences were, quote, "unfounded," end quote,  
25 and only one was of a sexual nature. And when looking at



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1 public crime data from the City of Everett, it's clear that  
2 more than twice as many crimes occurred at McDonald's and  
3 Starbucks locations than at any bikini barista stand within the  
4 City of Everett. So even though there may be crime in Everett,  
5 there is no connection between the secondary effects of crime  
6 and the regulated conduct, that is, wearing a bikini while  
7 serving coffee at a stand.

8 The City can't meet intermediate scrutiny showing the  
9 causal connection between the secondary effects and the  
10 regulated conduct of the way women dress at work. And even  
11 assuming that the City could, intermediate scrutiny requires  
12 that there be left open alternative channels of communication  
13 of the expression. And most of the cases relating to  
14 intermediate scrutiny relate to strip clubs. There are  
15 secondary effects associated with strip clubs, and it's fair  
16 for a city to zone strip clubs so that churches and schools  
17 might be in one part of town, strip clubs might be in another  
18 part of town. Here, the ordinances at issue have the impact of  
19 creating a complete ban on the expression of a bikini barista  
20 stand. There aren't any alternative channels of communication  
21 available for the expression. And the Supreme Court has said,  
22 several times, that a complete ban is not a reasonable time,  
23 place, and manner of restriction. And thus, the City cannot  
24 survive even intermediate scrutiny.

25 THE COURT: Well, let's talk about some of the things

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1 that might be appropriate for the City to do.

2 Would it be appropriate for the City to basically say that  
3 you can't have a window that somebody could reach in, if what  
4 they're worried about is a trading sex acts for tips?

5 MR. NEWMAN: Your Honor, that sounds reasonable to  
6 me.

7 THE COURT: Or if they are concerned about the  
8 response to the bikinis, men coming in and exposing themselves  
9 or masturbating, that you put a camcorder outside the barista  
10 stand.

11 MR. NEWMAN: Your Honor, that sounds quite reasonable  
12 to me.

13 THE COURT: That you record license plates that come  
14 through.

15 MR. NEWMAN: Your Honor, that sounds very reasonable.

16 THE COURT: All right. Now let's talk about void for  
17 vagueness.

18 Do I need to reach the constitutional issue if I find that  
19 the statute is void on its face? Because, honestly, they've  
20 used some terms that I'm not sure are known or one wouldn't  
21 have to get out a diagram to understand how you'd enforce it.  
22 For example, when you look up the term "anal" and "cleft,"  
23 there is no combination of those two. You get "anal," or you  
24 get "cleft."

25 Would I be justified in stopping there? In other words,

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1 why do you need me to reach the constitutional issue on a  
2 preliminary case?

3 MR. NEWMAN: Your Honor, to the extent that the  
4 ordinances are void for vagueness, the Court can find that they  
5 are unconstitutional for that reason. But we would also  
6 submit, of course, that they're unconstitutional because they  
7 violate the First Amendment and the equal protection clause.  
8 The equal protection clause prohibits the City from passing an  
9 ordinance that discriminates based upon gender, unless the City  
10 has an exceedingly persuasive justification. The citywide  
11 ordinance discriminates on its face, calling out the female  
12 breast, and requiring that women do not wear any clothing that  
13 exposes the lower half of the breast, measuring from the top of  
14 the areola.

15 The City states two justifications for the citywide  
16 ordinance. The first is to protect the community from nudity.  
17 The second is ease of enforcement. Neither is an exceedingly  
18 persuasive justification. The first, protecting the community  
19 from nudity, is unnecessary with this citywide ordinance,  
20 because there's already an existing lewd conduct ordinance that  
21 does just that. Nudity is already prohibited. And the second  
22 justification, ease of enforcement, doesn't apply, because with  
23 the existing lewd conduct ordinance that prohibits nudity, an  
24 officer need only glance to see if a woman's covered up. If  
25 so, she complies with the law. If not, she doesn't. Whereas

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1 with the citywide ordinance, that amends the lewd conduct  
2 ordinance, in order for an officer to enforce the law, the  
3 officer must require a woman to undress so that the officer can  
4 measure from the top of the areola to ensure that not more than  
5 half of the bottom half of the breast is exposed. And there's  
6 some wiggle room, some subjectivity, because it's not always  
7 clear where a breast begins and ends. There is no ease of  
8 enforcement in the citywide ordinance, and so there's no  
9 exceedingly persuasive justification for it, and it violates  
10 the equal protection clause.

11 THE COURT: Well, let's get back to my question,  
12 though. Let's assume, for the purposes of argument, that I  
13 might agree with you. So I've entered the preliminary  
14 injunction, that it cannot be enforced. And by doing so, I'm  
15 telling the City that there's a likelihood of success on the  
16 merits.

17 Why should I go forward and reach the constitutional issue  
18 if I've already told the City that they're going to have to  
19 rewrite their ordinance?

20 MR. NEWMAN: Well, the Court need not reach any  
21 issue, to the extent that the Court finds just one reason to  
22 establish that the plaintiffs have a likelihood of success on  
23 the merits. So while we would like the Court to reach the  
24 issue that the ordinances violate the First Amendment to the  
25 equal protection clause, the Court may not do that. The Court

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1 could find whatever door necessary to enter to establish that  
2 the plaintiffs have a likelihood of success on the merits.

3 As to the equal protection clause on the dress code  
4 ordinance, while the dress code ordinance is facially neutral,  
5 there has never, in the history of the City of Everett, been a  
6 bikini barista that is a man, and so that ordinance only  
7 applies to women. And the City's justification, again, are the  
8 secondary effects, of prostitution and sexual exploitation of  
9 minors and lewd conduct. But the criminal data shows that  
10 there are more crimes at McDonald's and Starbucks than at any  
11 bikini barista stand, and so that is not an exceedingly  
12 persuasive justification.

13 Seeing that I only have five-and-a-half minutes left, if  
14 the Court has no remaining questions, I would like to reserve  
15 my remaining time for rebuttal.

16 THE COURT: Thank you.

17 MS. JOHNSON: For nearly a decade, the City of  
18 Everett has been dealing with the illegal conduct associated  
19 with bikini barista stands. The City tried addressing this  
20 conduct through its existing law enforcement tools, which  
21 proved to be largely ineffective and very challenging and  
22 burdensome to implement.

23 THE COURT: And part of that was because your own  
24 detectives were accepting sexual favors in order to tip off the  
25 baristas when they were coming; isn't that fair?

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1 MS. JOHNSON: Well, no. Actually, Your Honor, there  
2 was a Snohomish County detective, not a City of Everett  
3 detective, but certainly that was one of the issues that was in  
4 place in the conduct that was -- in the legislative record.

5 THE COURT: Well, let's talk a little bit about what  
6 it is the City is trying to stop.

7 MS. JOHNSON: Sure.

8 THE COURT: Is the City trying to stop what the  
9 baristas are doing, or is the City trying to stop what men are  
10 doing in response to the baristas? Because as I understand it,  
11 you know, one of the things you list is that you don't want  
12 indecent exposure, you don't want masturbation, you don't want  
13 prostitution, you don't want minors being pressed into service.

14 But aren't all of -- except for the minor situation, which  
15 I'm going to turn to the employer in a minute -- aren't all the  
16 other things what the customers are doing in response to the  
17 baristas? Why not litigate and charge the customers?

18 MS. JOHNSON: Well, Your Honor, I think that what  
19 the -- what the City's goal here is multifaceted. It's to  
20 address all of the problems that you've identified. I think  
21 that the problems, as exhibited and demonstrated in the record,  
22 are that there is criminal conduct occurring, by a variety of  
23 actors, in this business.

24 THE COURT: By who?

25 MS. JOHNSON: Well, there's criminal conduct by the

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1 baristas. There's criminal conduct by the customers. There's  
2 criminal conduct by the owners.

3 THE COURT: And have you prosecuted the baristas?

4 MS. JOHNSON: The City has done some prosecution of  
5 baristas, but largely the baristas that were arrested were not  
6 fully prosecuted, because they were -- gave information in  
7 exchange for deferred prosecution.

8 THE COURT: I see. So you found them helpful, but  
9 you haven't prosecuted baristas.

10 MS. JOHNSON: Well, I can't say for sure, one way or  
11 the other, whether the City has prosecuted baristas for this.  
12 But I think that the point is, Your Honor, that what the City  
13 is attempting to do is get to the cause of these problems,  
14 which is this business model that is at issue. And it's not  
15 hard to understand why this business model is problematic. We  
16 have a situation where we have women working in relative  
17 isolation, wearing next to no clothing, in an environment where  
18 they are encouraged to maximize the amount of tips that they  
19 make, and where there are owners who have absolutely no  
20 incentive to regulate the behavior, because all they have to do  
21 is say, "We didn't know what was going on." And so what the  
22 ordinance is intended to do is to say, "Look, we're going to  
23 make this conduct more difficult." We are going to say, "There  
24 have to be certain minimum areas of the body that are covered,"  
25 which make it harder to do and engage in the types of activity

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1 that we have been talking about. And the -- and it's easier to  
2 detect.

3 THE COURT: So is it what people wear that you're  
4 trying to control, or is it the business model? Because, for  
5 example, would it be possible to pass an ordinance that says  
6 there would be no tipping? Period. I mean, Mr. Newman has  
7 gotten up and said this is about free expression.

8 MS. JOHNSON: Yes. And we dispute that.

9 THE COURT: And if it's about tipping, then you  
10 basically say that barista stands, that there are no tips. The  
11 cost of a latte might be ten bucks, but there are no tips.

12 MS. JOHNSON: Well, Your Honor, I think that that may  
13 be one hypothetical alternative here.

14 THE COURT: Okay. Let me pose another one. If you  
15 want to stop -- if you want to stop masturbation and lewd  
16 conduct on the part of the men who are aroused here, why not  
17 post a camera right outside and take down license plates? You  
18 could post it in the *Everett Herald*.

19 MS. JOHNSON: Well, Your Honor, I think the point  
20 that the case law makes, very clearly, is that the job of the  
21 courts here isn't to second-guess what the City has done. And  
22 the City has given substantial latitude to try and address  
23 problems within its own borders.

24 THE COURT: What the Court's job, though, is to look  
25 for a less restrictive alternative, if there's something else



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1 that can substitute. So I'm making some suggestions to you as  
2 to how it is that you might regulate this, without trying to  
3 regulate what people wear.

4 So if you're going to regulate what people wear, tell me  
5 how it is that the police officer is going to decide who has  
6 violated the statute that concerns the anal cleft. And my  
7 question to you is, from which end do you measure?

8 MS. JOHNSON: Well, Your Honor, the term "anal  
9 cleft," first of all, does not appear in the dress code  
10 ordinance. That is only in the lewd conduct ordinance. And  
11 the lewd conduct ordinance almost is -- identically mirrors the  
12 ordinance that's in effect in Snohomish County. So the  
13 language of that ordinance is the same as what the plaintiffs  
14 themselves acknowledge they already understand and follow, when  
15 they are working in Snohomish County. And so I think any claim  
16 that it's vague or not understandable is completely undercut by  
17 the fact that the ordinance is the same. And there's no  
18 question that they have not only not challenged that ordinance,  
19 but they follow it. And so --

20 THE COURT: Why should I be worried about that  
21 ordinance? That's not the one in front of me.

22 MS. JOHNSON: Well, I agree, Your Honor.

23 THE COURT: Okay.

24 MS. JOHNSON: I don't think the lewd conduct  
25 ordinance -- I think that's very secondary here. I think that

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1 plaintiffs' claim here is a First Amendment challenge to the  
2 dress code ordinance. And the plaintiffs are saying, "We have  
3 a right of expression here." And we disagree, Your Honor. We  
4 think that this is not a case in which there is any type of  
5 particular message that's being offered. And we think that  
6 it's considerably unlikely that the message is going to be  
7 received in the manner intended. And it's plaintiffs' burden  
8 here to establish that they do have a protected First Amendment  
9 right. And it's our position that they simply haven't done so.

10 THE COURT: You didn't answer my question, which is,  
11 how is it that a police officer is going to decide whether  
12 somebody has violated the statute, without some subjective  
13 measurement?

14 MS. JOHNSON: Which -- which ordinance are you  
15 referring to?

16 THE COURT: I'm talking about the lewd conduct.

17 MS. JOHNSON: The lewd conduct ordinance?

18 THE COURT: The one that applies to the baristas, not  
19 the one that applies citywide.

20 MS. JOHNSON: Well, no. I think it's backwards,  
21 though, Your Honor. The dress code ordinance only would apply  
22 to the baristas --

23 THE COURT: All right. The dress code --

24 MS. JOHNSON: -- the quick-service facilities.

25 So the dress code ordinance, first of all, is broader,

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1 obviously, than the lewd conduct ordinance. So to the extent  
2 that the Court accepts the dress code ordinance, I don't think  
3 you need to even to get to the lewd conduct ordinance, under  
4 the facts here, because the plaintiffs, I don't believe, are  
5 making a facial challenge in their motion to the lewd conduct  
6 ordinance. And certainly in their work as bikini baristas,  
7 they would be required to wear more clothing than what they are  
8 wearing -- would be required to wear under the lewd conduct  
9 ordinance.

10 And I think what Your Honor's question is going to is  
11 really a question of enforcement. And I think the testimony in  
12 the record is that these are not -- these terms are not vague,  
13 in any sense. They're actually used commonly in these types of  
14 ordinances, including the Snohomish County ordinance. They've  
15 been upheld against vagueness challenges by the Court.

16 THE COURT: Really? Do you have a case upholding  
17 that particular language?

18 MS. JOHNSON: With the "anal cleft" language, Your  
19 Honor? Yes. We cite a number of cases. I don't have them at  
20 my fingertips, but there are a number of cases in our briefing  
21 that expressly address --

22 THE COURT: In the State of Washington.

23 MS. JOHNSON: They are federal cases, Your Honor, or  
24 from other jurisdictions. They are not, as I understand, from  
25 this particular jurisdiction.

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1 But in any event, Your Honor, I think that the question  
2 with respect to the lewd conduct ordinance really is not one  
3 that Your Honor needs to reach on the facts that are at issue  
4 here.

5 THE COURT: All right. Let's talk about the  
6 expression issue.

7 Would you agree with me that wearing a pink pussy hat was  
8 speech, at this point? Somebody wants to March and put on a  
9 hat. Is that speech?

10 MS. JOHNSON: Well, Your Honor, I think then you're  
11 getting straight into the *Spence* analysis, right? You're  
12 saying, is there a particular message that was being conveyed  
13 by wearing a pink hat, and was it understandable the way --  
14 what that message was? And I think, in that case -- I think  
15 there's a good likelihood that there was that understanding of  
16 the message. Whereas here, when you look at what the  
17 plaintiffs are saying their message is, in Mr. Newman's own  
18 words, it's varied. It's not even consistent among the  
19 plaintiffs themselves, right? They actually say -- there are  
20 15 different terms that they're using to describe what their  
21 message is.

22 THE COURT: And if one of the baristas were to  
23 fashion a bikini out of pussy hats, would that be speech?

24 MS. JOHNSON: So an outfit that would not comply with  
25 the dress code ordinance, Your Honor? Well, no, Your Honor, I

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1 don't think that you would take it to that degree, because I  
2 don't think anyone would understand that that's what they're  
3 doing, and particularly -- I'm not sure how, first of all, you  
4 would make a hat into something akin to what the baristas are  
5 wearing in the stands. But there has to be also -- the message  
6 has to be understood, right? So there has to be both an  
7 intention to send a message and, simultaneously, an  
8 understanding of that message. And that's what we're saying  
9 doesn't happen here.

10 And there are numerous cases that talk about the way  
11 people dress, and how that is not protected First Amendment  
12 speech if there's not that sufficient particularization and  
13 comprehensibility. And in fact, the cases go so far as to  
14 say -- to recognize the idea that we're going to protect  
15 someone's attire when they say, "Oh, I feel good," or, "I feel  
16 sexy," that that's going to give essentially the expressive  
17 conduct cases a bad name. And I think recognizing what the  
18 plaintiffs are saying here would do the same, because I just  
19 don't think there's any basis to get into the First Amendment,  
20 under the facts that we have here before us.

21 And, Your Honor, touching on the equal protection issue,  
22 again, Your Honor, the plaintiffs acknowledge that the dress  
23 code ordinance is facially neutral. It's going to apply  
24 equally as across genders. And there is no -- so essentially,  
25 it's subject to rational basis, and I don't think there's any

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1 way that the Court can strike it down on that ground.

2 And with respect to the lewd conduct ordinance -- which,  
3 again, I don't think the Court needs to reach here -- the  
4 weight of authority supports the City's position that there is  
5 a governmental interest that is served by regulating male and  
6 female breasts differently. And that has been upheld  
7 throughout the case law, including most recently just last week  
8 by the Seventh Circuit. So I think there isn't any basis on  
9 that ground to challenge the lewd conduct ordinance either.

10 And, Your Honor, with respect to -- going back, just  
11 briefly, to the First Amendment, I think that it's very clear  
12 that to the extent the plaintiffs do have some message that  
13 they are intending to convey, that they have adequate  
14 alternative channels of doing that, including through simply  
15 the spoken word. They can interact in a friendly, open,  
16 empowered manner with their customers. There isn't anything  
17 inherent about what they're wearing that means that they have  
18 to have that particular outfit on in order to send those  
19 messages. And, Your Honor, I think that to hold to the  
20 contrary would be just to simply define what is being regulated  
21 as the message, and that the courts have never gone in that  
22 direction.

23 THE COURT: Well, let's back up here. You told me  
24 that what the City of Everett wants to do is to regulate this  
25 business model, but most of your argument has gone to the dress

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1 issue.

2 Is the City of Everett trying to legislate modesty, or are  
3 they trying to attack a business model? You seem to be arguing  
4 both things. In other words, why should I be worried whether  
5 somebody wears a bikini or not? There are changing mores. It  
6 used to be that women didn't expose their ankles. And then  
7 women didn't wear pants. And then women didn't wear spaghetti  
8 straps going to church. And so the mores change.

9 Why does the City of Everett want to change what the mores  
10 are?

11 MS. JOHNSON: Well, I don't think the City of Everett  
12 wants to change what the mores are. I think what the City of  
13 Everett is doing is regulating -- we're talking here about the  
14 dress code ordinance. The City of Everett is saying there  
15 needs to be certain minimum body areas that are covered when  
16 you are working in the -- in a quick-service facility. And the  
17 City --

18 THE COURT: Now answer why. Why is it that you need  
19 to regulate the dress, if what you're after is the business  
20 model, or if what you're after is the response to the dress?

21 MS. JOHNSON: Well, Your Honor, I think what the  
22 intent behind the regulation -- and this is in the un-rebutted  
23 testimony from the police -- is that this will be an important  
24 tool in being able to address the illegal conduct. So this is  
25 going to the secondary effects. This is not about regulating

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1 modesty, or not wanting to see women wearing certain clothing.  
2 It's that the evidence here is that this model has harmful  
3 secondary effects, and that this ordinance will address those  
4 secondary effects by regulating what the attire is and --  
5 which, again, makes it more difficult to engage in this  
6 criminal conduct. And it also makes it easier to detect. So  
7 if, for example, you are expecting to see someone wearing  
8 clothes in a barista stand, and you drive by and they're not  
9 wearing a shirt, because they're engaged in some form of sex  
10 show or lewd conduct, then it's a lot easier to see that. It's  
11 not such a close call here. And it doesn't involve the same  
12 level of law enforcement resources that are necessary, under  
13 the existing laws, in order to target this problem.

14 And I think, again, Your Honor, that the City doesn't have  
15 an obligation to say, "This ordinance is the panacea. This is  
16 going to solve every problem that we've ever encountered." The  
17 case law is very clear that this just has to have some effect  
18 on what's happening. And I think there's no dispute that it  
19 will. And in large part, Your Honor --

20 THE COURT: Let's talk about the "no dispute."  
21 Mr. Newman has basically gone through, saying your data is --  
22 doesn't support the position that you argue for, and your data  
23 is old, and your data concerned two particular actors that are  
24 no longer on the scene.

25 So, you know, where is your nexus between the clothing and



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1 the crime that you are trying to -- that you're trying to stop?

2 MS. JOHNSON: Well, I don't think it's a fair  
3 characterization of the record, in the first place, and I think  
4 that there is clear indication that the conduct wasn't limited  
5 solely to these two actors. In fact, the plaintiffs' stand,  
6 that's at issue here, was the subject of criminal enforcement.

7 And I think in addition to that, Your Honor, there is  
8 further evidence in the record that these crimes continue in  
9 other jurisdictions, and quite possibly and quite likely in  
10 Everett, as well. It's just the City has turned its  
11 enforcement efforts away from the intensive law enforcement  
12 focus to a legislative solution here. And so the City is  
13 entitled to look at other jurisdictions' experiences, which  
14 mirror its own, and legislate accordingly. And so the idea  
15 that we have to prove that these plaintiffs are responsible for  
16 anything is not the case. We can say, setting aside whether  
17 that's going to have any impact in a particular case, there is  
18 a broader problem here. And we think that this record  
19 establishes that. This is a robust record, in comparison to  
20 what courts have found to be sufficient to support a secondary  
21 effects analysis.

22 THE COURT: Well, then, tell me what about this  
23 record is robust.

24 And, you know, maybe I'm missing something here. But  
25 you've got anecdotal. You've got police reports going back a

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1 certain period of time. Do you have any direct sociological  
2 studies about what is going on here?

3 MS. JOHNSON: Well, I think the studies that the City  
4 has relied on are those that relate to the adult entertainment  
5 industry, because there are similar harmful secondary effects.  
6 And the case law, again, is clear that the City doesn't have to  
7 have particular data or studies about a solution that may not  
8 have been implemented previously, but that the City can look at  
9 similar situations and legislate from those experiences. So  
10 the studies in the record really go to what those secondary  
11 effects are, and that's entirely permissible for the City to  
12 look at and use as a comparator.

13 THE COURT: Okay. So you're telling me that buying  
14 lattes and going into strip clubs are comparable?

15 MS. JOHNSON: Well, what I'm saying, Your Honor, is  
16 that the type of adult -- well, first of all, Your Honor, I  
17 think in some situations that the attire here is the same as  
18 what is in a strip club. And so the same types of secondary  
19 effects that those businesses have been proven to have have  
20 also been observed with respect to the bikini barista stands.  
21 So those include public masturbation. Those include  
22 harassment. And those include the variety of sexual conduct  
23 that we've talked about. And, you know, unlike a strip club,  
24 where there are very clear regulations and protections, we  
25 don't have the same thing here. And that's, in part, what the

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1 ordinance is intended to address.

2 THE COURT: Well, in the strip club, they don't have  
3 a clothing ordinance, presumably, but they do have other  
4 restrictions. For example, lighting, distances. Why is it  
5 that those kinds of ordinances wouldn't work? If you believe  
6 that these baristas are engaged in criminal conduct, you know,  
7 put a cam in the barista stand. Why do you change what they  
8 wear, as opposed to what they do?

9 MS. JOHNSON: Well, Your Honor, I think, again, going  
10 back to what I said before, I think that this is about  
11 regulating the conduct that's at issue here, and that changing  
12 the clothing will eliminate much of that conduct.

13 And with respect to your specific question about cameras,  
14 again, Your Honor, the job here isn't to say, "Are there  
15 theoretical possible alternatives that might work?" It's to  
16 look at what's here. And it doesn't have to be the least  
17 restrictive of the alternatives. And there is actually case  
18 law that says video surveillance isn't necessary -- even if it  
19 could be considered to be less intrusive, or less restrictive,  
20 that we're not going to require that. And the testimony also  
21 in the record is that, in and of itself, just monitoring that  
22 surveillance, is significantly time consuming, and doesn't  
23 address the type of enforcement issues that we have here, in  
24 particular where we're trying to say, "We don't want the police  
25 to have to spend significant resources doing something, when

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1 the business owners are in as good, or better, of a position to  
2 help address these same concerns."

3 THE COURT: So why not fashion an ordinance that  
4 fines the business owner if one of their employees engages in  
5 lewd conduct?

6 MS. JOHNSON: Well, Your Honor, I think that, again,  
7 then, we have to go through the proof of the lewd conduct,  
8 which is more challenging than going through the proof of the  
9 dress code violation. And the purpose of that is to say,  
10 again, it's much harder to engage in the conduct when you're  
11 wearing certain minimum clothing. And so it's a good proxy  
12 here for the lewd conduct, to say, "You have to wear certain  
13 clothes." And so, for example, if we see that someone is not  
14 wearing clothing, then we can say, "Okay. Well, that is lewd  
15 conduct," and so it's easier to detect. And, Your Honor,  
16 again, it's the idea that the stand owners need to have a stake  
17 in this, and not involve the requirement that the police spend  
18 the significant amount of resources that are necessary in order  
19 to enforce the existing laws with this current business model.

20 And, Your Honor, if Your Honor -- I'm not sure where I am  
21 with time, but if Your Honor doesn't have any further  
22 questions, I think that it's important here to understand that  
23 this isn't a case about the First Amendment. And I think in  
24 order to even get to all of the questions that Your Honor has  
25 been asking, you have to find that the conduct here is

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1 protected under the First Amendment. And I think that there is  
2 no authority that supports that proposition. I think it would  
3 go -- be contrary to all of the existing authority to find  
4 that.

5 But even if Your Honor does find that, I think, again, the  
6 case law is clear, that the City has a substantial interest in  
7 regulating secondary effects that it sees within its borders,  
8 and that the City needs to have the latitude in order to do  
9 that, even if we disagree that it may be not the least  
10 restrictive means. That isn't the test that the Court needs to  
11 apply here.

12 And so, Your Honor, for those reasons and the reasons that  
13 we've stated in our brief, we would ask that you deny the  
14 plaintiffs' motion.

15 THE COURT: Thank you.

16 MR. NEWMAN: Your Honor, the City should regulate the  
17 crime, and not the clothing. And to the extent that some  
18 additional regulations would be helpful, such as a distance  
19 requirement between the window, cameras, capturing license  
20 plates, I don't know that there would be a constitutional  
21 issue. But there is a constitutional issue when the City is  
22 regulating clothing choices and not crimes. Whether a barista  
23 covers the back below the shoulder blades won't change, one way  
24 or another, criminal activity. And if the City needs to  
25 monitor that, there are other types of ordinances that could be

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1 in place to help them monitor whether there's criminal activity  
2 going on. But preventing baristas from expressing the message  
3 that they do would not be helpful.

4 The City indicates that there isn't any expression, but  
5 yet one of its primary declarations is expert testimony to  
6 establish this message of sexualization. And the City, seeing  
7 this message of sexualization, has passed these ordinances  
8 because it objects to that message, which means the message is  
9 content based, strict scrutiny applies, and the City must  
10 exercise the least restrictive means possible to regulate the  
11 activity. And even the City implicitly acknowledges that it  
12 can't meet strict scrutiny.

13 I was correct in predicting that the City would suggest  
14 that *Spence vs. State of Washington* should be strictly  
15 construed, and that there has to be a particularized message.  
16 But in *Hurley vs. Irish-American*, the United States Supreme  
17 Court expressly held a particularized message is not required.

18 The City also submits that because there are individual  
19 messages, instead of a collective message, that somehow those  
20 individualized messages are not protected, but there is no  
21 authority that would indicate that. Individualized messages  
22 should be protected.

23 The City also suggests that the spoken word would be  
24 sufficient. But that wouldn't allow Liberty Ziska to display  
25 tattoos, or Leah Humphrey to display scars to invite the

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1 dialogue. And body confidence is a big part of the message  
2 here, and that can't be done through the spoken word. With  
3 flag burning, for example, there was argument that the people  
4 burning flags could simply march down to the capitol. But  
5 that's a different type of expression. Or they could, through  
6 a bullhorn, talk about objections to government activity. But  
7 that's not the same thing as flag burning.

8 The United States Constitution and the First Amendment  
9 protects all forms of expression. And here, the City is  
10 attempting to ban a very important form of expression for these  
11 baristas.

12 THE COURT: Mr. Newman, let's talk about the  
13 secondary effects. The City argues that this is resulting in  
14 large secondary effects. And we've already talked about the  
15 kind of behavior that they are concerned about.

16 Is there material in their proposals that shows that  
17 secondary effect? You attacked it, previously, on -- that  
18 these police reports show unfounded things, or that the numbers  
19 that they claim. Is there anything in this material that shows  
20 a connection?

21 MR. NEWMAN: No, Your Honor. And for that reason, we  
22 appreciate the Court reviewing the entire record. The Court  
23 will find a substantial record, thousands of pages. But of the  
24 police reports, most deal with these two criminal actors that  
25 the City successfully prosecuted. The City didn't need

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1 additional ordinances to prosecute them. And the City should  
2 read the declarations that -- the Court should read the  
3 declarations that the City submitted. The declaration of the  
4 captain, who typed into the police database "barista," and then  
5 concludes that there were 65 incidences, when, in truth, there  
6 were 12, most were unfounded, and only one was of a sexual  
7 nature.

8 THE COURT: I read the material, and I know that  
9 there's also a motion to strike that you've brought, as well.  
10 But what I'm looking for, is there -- is there material out  
11 there? Your sister counsel argues that they turned to the  
12 strip clubs for analogous examples. Is that a fair analysis?

13 MR. NEWMAN: It is not, Your Honor. Serving coffee,  
14 while confidently wearing a bikini, through a window, is not  
15 the same as being completely nude, in a dark room, for long  
16 periods of time. A bikini barista stand is in a public  
17 location, with a window, that police officers can monitor, and  
18 can send their compatriots of -- undercover. There is no  
19 comparison between a strip club and what the bikini baristas  
20 do. And if the Court reads the deposition transcripts -- the  
21 City has taken the deposition of most of my clients -- they  
22 explain why. They earn a fair living expressing themselves in  
23 a way that is unique. And it is that message of fearless body  
24 acceptance, and confidence, and openness, and acceptability  
25 that allows them to portray themselves in a positive light.



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1 They have changed the message. They are no longer sexual  
2 objects, such as women want to be in a strip club. They are  
3 portraying themselves positively. And it is that message that  
4 must be presented.

5 THE COURT: So is it the message, or is it the money?  
6 Because if the City were to pass an ordinance saying that fast  
7 food places could not charge -- could not accept tips, you  
8 know, you could have a latte that was worth \$20, but you don't  
9 accept tips.

10 Wouldn't that take off the pressure that the City says is  
11 being exerted on women to perform lewd acts in order to make  
12 more money?

13 MR. NEWMAN: No, Your Honor, because the pressure  
14 does not exist. The bikini baristas who are plaintiffs in this  
15 case have testified that because they are earning a good  
16 living, they are less likely to take off clothing. If they  
17 take off clothing, they lose their jobs. And they earn a  
18 really good living as bikini baristas, because it is an art  
19 form that customers come to see. So customers do pay more than  
20 at Starbucks. They should be allowed to earn that living. And  
21 to the extent that they don't earn as good of a living as they  
22 do, then perhaps they would work elsewhere, or perhaps then  
23 there would be some kind of pressure to perform acts that they  
24 would never perform now because they would be fired and lose  
25 their job. It would be extremely short-sighted, and that's not

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1 why they are bikini baristas. They're bikini baristas to  
2 express themselves in a way that shines a positive light on  
3 them, unlike the criminal bad actors who have been prosecuted  
4 under existing laws.

5 The Court should enter a preliminary injunction. Thank  
6 you.

7 THE COURT: It's my understanding that there is an  
8 agreement that this ordinance is not going to be enforced until  
9 a ruling comes down; is that right?

10 MR. NEWMAN: Yes, Your Honor.

11 THE COURT: You can expect to see a -- an order from  
12 me coming out in approximately ten days. So not this week, but  
13 you should look for it at the end of next week.

14 Thank you for your arguments.

15 (Adjourned)

16 (End of requested transcript)

17 \* \* \*

18 I certify that the foregoing is a correct transcript from  
19 the record of proceedings in the above matter.

20

21 Date: 11/21/17

Andrea Ramirez

22

23

\_\_\_\_\_  
Signature of Court Reporter

24

25